

N.D.A.G. Letter to Kessel (Jan. 27, 1986)

January 27, 1986

Mr. Theodore Kessel, Jr.
City Attorney of LaMoure
19 1st Avenue S.E.
P.O. Box 216
LaMoure, ND 58458-0216

RE: Request for Attorney General's opinion concerning surplus mill levy funds in airport authority accounts

Dear Mr. Kessel:

Thank you for your letter dated November 21, 1985, in which you requested an Attorney General's opinion on two questions regarding surplus moneys in the sinking fund of an airport authority.

You stated as follows:

In 1970 the LaMoure Airport Authority purchased land and constructed an airport near LaMoure with the assistance of the North Dakota Aeronautics Commission. Revenue bonds were sold to the Bank of North Dakota and were paid off as they matured during each of the years 1972, through 1985. The bonds totaled \$20,000.00 and were retired by an irrevocable tax levy by the City of LaMoure at the request of the Airport Authority. All bonds have now been paid off and there remains in the Airport Authority sinking fund in the Bank of North Dakota the sum of \$4,102.12 in checking and \$15,164.33 in savings as of October 31, 1985.

Based upon those facts, you asked:

1. Is the LaMoure Airport Authority legally obligated to retain the surplus mill levy funds or is it obligated to turn these funds over to the City of LaMoure to be placed in the general fund?
2. If the funds are to be retained by the Airport Authority may the Airport Authority consisting of five members vote to turn part or all of the funds over to the City and if so can it do so by simple majority vote?

ANSWER TO QUESTION 1

The minutes of the meeting of the airport authority that you provided indicate that the city created the sinking fund pursuant to the Revenue Bond Law, N.D.C.C. Ch. 40-35, in order to finance the project. The Revenue Bond Law provides, in part:

40-35-13. COVENANTS THAT MAY BE INSERTED IN ORDINANCE OR RESOLUTION AUTHORIZING BONDS. Any ordinance or resolution authorizing the issuance of bonds under this chapter to finance, in whole or in part, the acquisition, construction, reconstruction, improvement, betterment, or extension of an undertaking may contain covenants, notwithstanding that such covenants may limit the exercise of powers conferred by this chapter, as to:

* * *

2. The use and disposition of the revenues of said undertaking.
3. The creation and maintenance of reserves or sinking funds and the regulation, use, and disposition thereof.
4. The purpose or purposes to which the proceeds of the sale of said bonds may be applied and the use and disposition of such proceeds.

* * *

Pursuant to § 40-35-13, the LaMoure City Council passed a resolution that authorizes a tax levy for the airport authority which states that the purpose of the levy is for "paying the interest on such bonds as it falls due and to pay and discharge the principal . . . and that such tax be irrevocable until the bonds and interest thereon are fully repaid." The resolution further states that the funds "shall be used for no other purpose than to pay such bonds and the interest thereon as the same become due. . . ." However, the airport authority's resolution authorizing issuance of the bonds provides that the bonds were issued "to provide money for the acquisition, construction, establishment, maintenance, and operation of an airport and the facilities and services in connection therewith. . . ."

Although you indicated in your letter that the two provisions appear to conflict with one another, I believe that they can be reconciled. So long as a portion of the principal or interest on the bonds remained unpaid, I believe that the provisions of the city's resolution were controlling because a city has broad powers to "do all things necessary or convenient in the exercise of the [Revenue Bond Law] or in the performance of its covenants or duties . . . in order to secure the payments of its bonds. . . ." N.D.C.C. § 40-35-03(5). See also §40-35-13, supra; N.D.C.C. §40-35-08-(10) (resolution authorizing issuance of bonds shall prescribe "terms, contents, and conditions" of bonds).

However, once the principal and interest on the bonds have been paid, the city's "[p]ledge to the punctual payment of [the] bonds" (N.D.C.C. §40-35-03) has been discharged and I believe that the airport authority may use the surplus money to maintain the airport or transfer any or all of the money to the city pursuant to N.D.C.C. §2-06-07. This statute provides, in part, that "[a]n [airport] authority shall have all the powers necessary or convenient to carrying out the purposes of [the Airport Authorities Act] including the power to . . . execute such contracts and other instruments and take such other action as may be necessary or convenient to carry out the purposes of this chapter." N.D.C.C. § 2-06-07(2) (emphasis supplied).

Thus, I believe that the LaMoure Airport Authority is legally obligated to retain the mill levy funds until the principal and interest on the bonds have been paid in full. However, once the principal and interest have been paid in full, I believe that the airport authority may transfer part or all of the funds to the City of LaMoure to be placed in the city's general fund.

ANSWER TO QUESTION 2

N.D.C.C. § 2-06-06 provides, in part:

2-06-06. Commissioners -- Compensation --Meetings -- Officers. --

* * *

The powers of each [airport] authority shall be vested in the commissioners thereof. A majority of the commissioners of an authority shall constitute a quorum for the purpose of conducting business of the authority and exercising its powers and for all other purposes. Action may be taken by the authority upon a vote of not less than a majority of the commissioners present.

Thus, I believe that if the governing body of the airport authority is able to form a quorum, then a simple majority of those present may vote to transfer part or all of the surplus funds over to the city.

Sincerely,

Nicholas J. Spaeth

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